



August 29, 2001

Mr. James L. Hall
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2001-3831

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151276.

The Texas Department of Criminal Justice (the "department") received a request for seventeen categories of information pertaining to the case of *Robert D. Sikes v. Juan F. Gaytan*. You indicate that you do not have information that is responsive to request number 1 in the format requested. However, a governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 at 8 (1990). If the department maintains records from which information responsive to request number 1 can be obtained, it must provide that information to the requestor. You also state that you do not have information responsive to request number 11, with respect to the specified inmates. However, you do not state that you do not have information responsive to request number 11 related to the specified doctor. We assume that to the extent that responsive information relating to the doctor exists, that information has been released. See Gov't Code §§ 552.301, .302. You also indicate that you have provided information to the requestor which is responsive to requests numbers 4, 5, 9, and 13-17. Finally, you indicate that you have submitted request numbers 6, 7, 8, and 12 to the department's Executive Services for response. We assume this means that you will be releasing this information to the requestor. If not, you must do so. *Id.* You claim that the submitted information, which you indicate is responsive to request numbers 2, 3, and 10, is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that Exhibit A contains a mental health record. Chapter 611 of the Health and Safety Code provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002 applies to “[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional.” *See also* Health & Safety Code § 611.001 (defining “patient” and “professional”). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the mental health record contained in the submitted information that may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, .0045.

We next address your arguments under section 552.131 of the Government Code. Section 552.131 relates to information about inmates of the department. Section 552.131 provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov’t Code § 552.131(a). Section 552.029 of the Government Code provides in relevant part:

Notwithstanding . . . Section 552.131, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure[:]

. . .

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Gov’t Code § 552.029(8). Thus, the legislature explicitly made section 552.131 subject to section 552.029. Pursuant to section 552.029(8), “basic information” regarding “an incident involving the use of force” is subject to required disclosure. Basic information that is subject to disclosure under section 552.029(8) includes the time and place of the incident, the names of inmates and of department employees who were involved, a brief narrative of the incident, a brief description of any injuries sustained by anyone involved, and information regarding any criminal charges or disciplinary actions that

were filed as a result of the incident. After reviewing the submitted information, we conclude that the submitted information in Exhibit A is about inmates and must be withheld under section 552.131. However, basic information in Exhibit A regarding an incident involving the use of force must be released pursuant to section 552.029.

In addition, with respect to the information in Exhibit A, you raise section 552.107(2) of the Government Code in conjunction with the decision in *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part and rev'd in part*, 679 F.2d 1115, *amended in part and vacated in part, reh'g denied*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). Section 552.107(2) provides that information is excepted from required public disclosure if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). The Stipulated Modification of the Amended Decree in the *Ruiz* case restricts the dissemination of "sensitive information" regarding inmates. See Open Records Decision No. 560 (1990). However, the final judgment in *Ruiz*, entered on December 11, 1992, gives the Texas Board of Criminal Justice (the "board") authority to define the term "sensitive information." On January 21, 2000, the board met and, acting under the authority of the final judgment in *Ruiz*, determined that "the term 'Sensitive Information' shall include all information regarding TDCJ-ID offenders not required to be disclosed pursuant to Section 552.029, Government Code." Thus, the board has determined that information that is subject to disclosure under section 552.029(8) of the Government Code is not "sensitive information" that the department may withhold from the public under section 552.107(2) in conjunction with the *Ruiz* decision.

We next turn to your arguments that section 552.107(1) excepts portions of Exhibit B from public disclosure. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. See Open Records Decision No. 574 (1990). Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure. *Id.* You state that Exhibit B "contains legal advice and opinion with regard to the [department's] liability in the Sikes case." After considering your arguments and examining the information at issue, we conclude that some of the information you have marked in Exhibit B reflects an attorney's legal opinion or advice. We have marked the information in Exhibit B that the department may withhold pursuant to section 552.107(1) of the Government Code.

In summary, we have marked the mental health record that may be released only as provided by sections 611.004 and 611.045 of the Health and Safety Code. In addition, the department must withhold Exhibit A under section 552.131 of the Government Code. However, basic information in Exhibit A must be released pursuant to section 552.029(8) of

the Government Code. We have marked the information in Exhibit B that the department may withhold pursuant to section 552.107(1) of the Government Code. Because sections 552.101, 552.107 and 552.131 of the Government Code are dispositive, we do not address your additional arguments except to note that the information that is subject to release under section 552.029 of the Government Code is not excepted by section 552.108 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'Yen-Ha Le', with a stylized flourish at the end.

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DKB/sdk

Ref: ID# 151276

Enc. Marked documents

c: Ms. Per Ann Hardy
Attorney at Law
418 Park Avenue East
San Antonio, Texas 78212
(w/o enclosures)